

May 26, 2004

NO. 03-74628

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE, SANTA LUCIA CHAPTER OF
THE SIERRA CLUB, AND PEG PINARD,
Petitioners

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE
UNITED STATES OF AMERICA,
Respondents

and

PACIFIC GAS AND ELECTRIC COMPANY,
Respondent-Intervenor

PETITION FOR REVIEW OF ORDERS LBP-02-23, CLI-02-23, AND CLI-03-1
OF THE U.S. NUCLEAR REGULATORY COMMISSION

**ANSWERING BRIEF OF RESPONDENT-INTERVENOR
PACIFIC GAS AND ELECTRIC COMPANY**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Pacific Gas and Electric Company ("PG&E") hereby files this Disclosure Statement.

Respondent-Intervenor PG&E is a corporation organized under the laws of the State of California, with its principal executive offices in San Francisco, California. PG&E is an operating public utility engaged principally in

the business of providing electricity and natural gas distribution and transmission services throughout most of Northern and Central California. Effective January 1, 1997, PG&E and its subsidiaries became subsidiaries of Pacific Gas and Electric Corporation, an energy-based holding company organized under the laws of the State of California, with its principal executive offices in San Francisco, California. Pacific Gas and Electric Corporation, PG&E's parent corporation, is the only publicly held corporation owning ten percent or more of PG&E's stock.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style with a long horizontal line extending to the right.

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Dated in Washington, District of Columbia
This 26th day of May 2004

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ANSWERING BRIEF OF RESPONDENT-INTERVENOR
PACIFIC GAS AND ELECTRIC COMPANY

I. JURISDICTIONAL STATEMENT

Respondent-Intervenor Pacific Gas and Electric Company ("PG&E")
agrees with the Statement of Jurisdiction in the Brief of Respondent U.S. Nuclear
Regulatory Commission ("NRC" or "Commission").

II. STATEMENT OF ISSUES FOR REVIEW

PG&E agrees with the Issues Presented as articulated by Respondent NRC.

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case concerns PG&E's application for a license from the NRC authorizing PG&E to possess spent fuel (and related radioactive materials) generated at the Diablo Canyon Power Plant ("DCPP") in an independent spent fuel storage installation ("ISFSI") to be constructed at the DCPP site. The present appeal requests reversal of two reasonable agency decisions made in connection with the NRC administrative proceeding on PG&E's license application.

Specifically, following a notice of opportunity for hearing on PG&E's Part 72 application, petitioners San Luis Obispo Mothers for Peace ("SLOMFP") *et al.*¹ filed a petition to intervene and request for hearing. Among other things, these petitioners proffered three environmental contentions, all based on the National Environmental Policy Act, as amended ("NEPA"), 42 U.S.C. § 4321, *et seq.*, related to the threat of terrorism posed to either the proposed ISFSI or to

¹ SLOMFP was joined by several other petitioners below; of those, only Peg Pinard and the Santa Lucia Chapter of the Sierra Club have joined in this appeal. SLOMFP, Peg Pinard, and the Sierra Club are referred to herein as the "Petitioners."

waste canisters in transit from the ISFSI to a waste repository at some time in the future. The NRC Atomic Safety and Licensing Board ("Licensing Board") properly rejected these contentions, determining them to be inadmissible in the NRC proceeding on the ISFSI license application as a matter of law. Following referral of the Licensing Board's ruling, the Commission subsequently affirmed the Licensing Board, reasonably holding that NEPA does not require an application-specific terrorism review. This is one Commission decision that is the subject of the current petition for review.

Shortly after submission of its terrorism-related contentions, SLOMFP *et al.* also filed with the Commission a separate petition asking that the Commission suspend the ISFSI licensing proceeding and complete a comprehensive review of measures to protect nuclear facilities against terrorist attacks. Alternatively, these petitioners asked that the Commission expand the scope of the hearing on PG&E's ISFSI application to encompass the issue of possible new security measures at the ISFSI and the power plant. The Commission denied this petition. This is the second Commission decision claimed to be in error in the petition for review.

The two NRC decisions under review were reasonable and appropriate agency decisions, consistent with the NRC's rules for admissibility of

contentions in licensing proceedings, consistent with the agency's own precedents, and consistent with applicable law.

B. COURSE OF THE PROCEEDING

A notice of opportunity for hearing was published in the *Federal Register* on April 22, 2002.² SLOMFP, on behalf of itself and several other groups, submitted a petition to intervene and request for hearing on May 22, 2002, and filed an amended petition setting forth proposed contentions for hearing on July 19, 2002. (Excerpts of Record ("ER") 44.) These petitioners proffered, among other contentions, three contentions based on NEPA and pertaining to the threat of terrorism. In Contention EC-1, the petitioners argued that PG&E's Environmental Report was inadequate because it did not include an assessment of the environmental consequences of deliberate acts of sabotage against the ISFSI. (ER 67-71.) In Contention EC-2, the petitioners argued that PG&E needed to evaluate in the Environmental Report the impact of sabotage-induced fires in the DCPD spent fuel pool (*not* fires at the proposed ISFSI). (ER 71-81.) In Contention EC-3, the petitioners argued that the Environmental Report failed to consider the

² Pacific Gas and Electric Co.; Notice of Docketing, Notice of Proposed Action, and Notice of Opportunity for a Hearing for a Materials License for the Diablo Canyon Independent Spent Fuel Storage Installation, 67 Fed. Reg. 19,600 (Apr. 22, 2002).

impacts of terrorist attacks while transporting fuel away from the proposed ISFSI to a repository at the end of the ISFSI license term. (ER 82-83.)

On September 9, 2002, twelve groups, including Petitioners, filed directly with the Commission (rather than the presiding Licensing Board) a separate petition seeking a review of the adequacy of NRC safety requirements related to the threat of terrorism. (ER 115.) The petitioners further demanded that the Commission either: (1) suspend the ISFSI proceeding until the NRC completed that review; or (2) expand the scope of the ISFSI proceeding to allow public participation in connection with potential new security requirements, for both the ISFSI and the already-licensed power plant. (ER 120-22.)

The Commission issued, on November 21, 2002, the first of the decisions that are the subject of this appeal. In CLI-02-23, the Commission denied the request to suspend or expand the ISFSI proceeding.³ (ER 27.) The Commission noted that it had already concluded in other adjudicatory proceedings in which terrorism issues had been raised that: (1) continued operation of nuclear plants and ISFSIs does not pose an imminent risk and is not inimical to the common defense and security; and (2) suspension of ongoing licensing proceedings is not warranted. (ER 30-31.) The Commission further noted that,

³ *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation) (hereinafter "*PG&E*"), CLI-02-23, 56 NRC 230 (2002).

with respect to the petitioners' request that the agency complete a comprehensive review of the adequacy of NRC safety requirements to protect against the terrorist threat, what the petitioners were seeking was already taking place. (ER 30.) Any additional security requirements that would be required in due course by the NRC following this generic review would be applied to the DCPD ISFSI at the appropriate time. (ER 32.) (The ISFSI itself would not be licensed until the completion of the proceeding, and no fuel would be moved to the ISFSI until after completion of construction (at the time, scheduled for 2006). (ER 31.)) As for the petitioners' requests to expand the proceeding and to allow for public participation on new security requirements, the Commission found the requests to be beyond the scope of the site-specific ISFSI adjudication. (ER 30.)

Subsequently, on December 2, 2003, the Licensing Board ruled in LBP-02-23 on the admissibility of the contentions proffered by the petitioners seeking to intervene in the ISFSI licensing proceeding.⁴ (ER 1.) With respect to the three terrorism contentions discussed above, the Licensing Board held them to be inadmissible as a matter of law by virtue of their direct challenge to the Commission's rules establishing specific physical security requirements and to the Commission's rule in 10 C.F.R. § 50.13 by which applicants are not required to

⁴ *PG&E*, LBP-02-23, 56 NRC 413 (2002).

design facilities against destructive acts by enemies of the United States. (ER 18-21). The Licensing Board referred its ruling on these contentions to the Commission — because identical issues related to terrorism had been raised in several other NRC proceedings and were pending before the Commission at the time.⁵

In CLI-03-1, issued on January 23, 2003, the Commission accepted the Licensing Board's referral of the terrorism issues, and affirmed the result reached by the Licensing Board.⁶ (ER 33.) In fact, in the interim between the Licensing Board referral and the Commission's decision in CLI-03-1, the Commission had considered the identical issue in the other pending licensing proceedings. Specifically, the Commission had chosen to address the issue first in

⁵ With respect to the issue of *spent fuel pool* fires, the Licensing Board also held that the petitioners had not demonstrated how the impacts of spent fuel pool accidents are relevant in an ISFSI licensing proceeding (an ISFSI would allow the licensee to move fuel out of the spent fuel pool). See *PG&E*, LBP-02-23, 56 NRC at 451. (ER 20.) With respect to the issue of *transportation of waste from DCP* (e.g., to a high level waste repository), the Licensing Board held that the contention was also inadmissible for failure to show a material factual or legal dispute because SLOMFP did not set forth any new information regarding PG&E's analysis of regional transportation impacts performed at the time of initial licensing. See *id.* at 453. (ER 21.) On appeal, Petitioners have not challenged these determinations.

⁶ *PG&E*, CLI-03-1, 57 NRC 1 (2003).

the *Private Fuel Storage, L.L.C.* case, involving a proposed commercial ISFSI.⁷ (Exhibits (“Ex.”) 1.) In CLI-03-1 the Commission simply applied the *PFS* precedent and held that NEPA does not require a terrorism review, for four reasons: (1) the possibility of a terrorist attack at any one facility is speculative and too far removed from the agency action to require study under NEPA; (2) the risk of a terrorist attack at a nuclear facility cannot be adequately quantified or determined; (3) NEPA does not require a “worst case” analysis; and (4) the NEPA public process is an inappropriate forum for considering sensitive threat assessment issues. (ER 36.)⁸

Following resolution of all issues in the ISFSI licensing proceeding, Petitioners filed the instant appeal. Petitioners argue that the Commission erroneously declined to hold a hearing on whether the environmental impacts of terrorist attacks and other “acts of malice or insanity” against the ISFSI should be addressed in an Environmental Impact Statement (“EIS”) under NEPA — and that the agency violated the Atomic Energy Act of 1954 (“AEA”), NEPA, and the

⁷ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002) (hereinafter “*PFS*”).

⁸ In its decision on the scope of NEPA as it relates to the DCPPI ISFSI, the Commission did not rely upon the rationale for 10 C.F.R. § 50.13, which was relied upon in part by the Licensing Board and which is discussed below. As in *PFS* and the Commission’s other decisions on NEPA and

Administrative Procedure Act (“APA”) by declining to hold a hearing on proposals to improve the security of DCPD before approving the ISFSI license.

IV. STATEMENT OF FACTS

A. DRY CASK STORAGE

The proposed ISFSI at DCPD would provide interim storage of spent fuel in accordance with the Nuclear Waste Policy Act of 1982, as amended (“NWPA”), 42 U.S.C. § 10101, *et seq.* In the NWPA, Congress determined that the federal government has the responsibility to develop a repository for permanent disposal of spent fuel. *See id.* § 10131(b)(2). In the interim, until that solution is realized, Congress directed that the operators of civilian nuclear power reactors such as PG&E have “primary responsibility” for interim storage of spent fuel, and that they should do so “by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical.” *Id.* § 10151(a)(1). Congress recognized that several methods could be used to increase spent fuel storage capacity, specifically including the “use of . . . dry storage capacity.” *Id.* § 10154(a).

terrorism, the Commission did not reach the issue of the applicability of that regulation to the issues raised under NEPA. (ER 36) (n.22).

As at other nuclear power plants, spent fuel at DCPD is currently stored in a spent fuel pool for each reactor unit at the reactor site. Dry cask storage allows spent fuel that has already been cooled for a time in a spent fuel pool to be removed from the pool and stored in a leak-tight steel cylinder. The cylinder is typically inserted into a concrete cask to provide radiation shielding to workers and members of the public. The casks themselves are robust containers that must meet stringent NRC safety requirements. An ISFSI is a facility for locating and maintaining a number of storage casks, up to a licensed maximum. ISFSIs must meet rigorous NRC safety and physical security requirements. *See, e.g.,* 10 C.F.R. Part 72, Subpart H.

On December 21, 2001, PG&E submitted the application for a site-specific license under 10 C.F.R. Part 72 to authorize it to construct and operate the DCPD ISFSI. The ISFSI would be co-located with the power plant at the DCPD site in San Luis Obispo County. After completion of the administrative proceeding, the NRC Staff issued the Part 72 license on March 22, 2004.⁹ No fuel

⁹ At the time it issued the ISFSI license in March 2004, the NRC issued a detailed Safety Evaluation Report ("SER"). (Excerpts from this public document are included as an Addendum to this brief.) Among other things, the SER addressed the revisions to the DCPD physical security plans to address the storage of spent fuel in the proposed ISFSI. The NRC concluded that, with respect to the proposed revisions, "(1) there is reasonable assurance that the health and safety of the public will not be endangered by operation in the proposed manner; (2) such activities will be conducted in

can be moved from the DCPD spent fuel pool to the ISFSI, however, until after completion of construction.

B. NRC'S POST-SEPTEMBER 11 SECURITY INITIATIVES

As described below, nuclear facilities are subject to rigorous physical security requirements. Further, beginning hours after the September 11, 2001 attacks, the NRC issued a series of classified "advisories" suggesting that power reactor licensees voluntarily impose certain additional security enhancements at their facilities. Those enhancements were later formalized and expanded upon by immediately effective orders issued to all licensees on February 25, 2002.¹⁰ The orders imposed on each reactor licensee requirements for certain Interim Compensatory Measures ("ICMs"). The ICMs generally addressed land vehicle threats, waterborne threats, contingencies for responding where there are large,

compliance with the Commission's regulations; and (3) the issuance of these physical security plan changes will not be inimical to the common defense and security or to the health and safety of the public." *See* SER, Docket No. 72-26, Diablo Canyon Independent Spent Fuel Storage Installation, Materials License No. SNM-2511, March 2004, at § 10.1.6. (Addendum 12-13.)

¹⁰ *See* All Operating Power Reactor Licensees, Order Modifying Licenses (Effective Immediately), EA-02-026, 67 Fed. Reg. 9792 (Mar. 4, 2002). (Ex. 44.) Similarly, security orders were issued to numerous other nuclear facilities, including, for example, a uranium conversion facility in March 2002, decommissioned reactors in May 2002, and transporters of spent nuclear fuel in December 2003.

damaged areas of the plant (such as from an airborne assault or other major event), enhanced access control mechanisms, and enhanced armed response strategies.

On January 7, 2003, the NRC issued additional orders to all licensees to enhance the screening of applicants for access authorizations at commercial nuclear plants, as well as individuals already possessing unescorted access at a facility.¹¹ These requirements again augmented the substantial requirements previously imposed by the NRC.

Subsequently, on April 29, 2003, after further comprehensive review, the NRC issued three more orders to power reactor licensees. One of the orders specifically provided details of a revised and enhanced “Design Basis Threat” (“DBT”) — that is, the characteristics of a hypothetical adversary against which the licensee’s security program must be sufficient to defend.¹² Another series of

¹¹ See All Operating Power Reactor Licensees, Order Modifying Licenses (Effective Immediately), EA-02-261, 68 Fed. Reg. 1643 (Jan. 13, 2003).

¹² See All Operating Power Reactor Licensees, Order Modifying Licenses (Effective Immediately), EA-03-086, 68 Fed. Reg. 24,517 (May 7, 2003). (Ex. 63.) Prior to the April 29, 2003 Order, the DBT already assumed a suicidal, well-trained paramilitary force, armed with automatic weapons and explosives, that was intent on forcing its way into a nuclear power plant to commit radiological sabotage. The former DBT also assumed that the attackers had insider knowledge of plant systems and plant security plans, as well as actual insider assistance. The enhanced DBT is even more aggressive. In addition to the enhanced DBT, the NRC orders increased the security of power reactor facilities by limiting security force worker fatigue and enhancing security force training. See All Operating Power Reactor

orders was issued on October 16, 2002, to all licensees who store spent fuel at an ISFSI or who had identified near term plans to store spent fuel in an ISFSI. The orders, in essence, required that the ICMs applicable to reactor sites would apply to the ISFSIs at such sites.¹³

All told, while the full content of the various orders and the revised DBT itself are considered “Safeguards Information” and withheld from public disclosure,¹⁴ it is clear that nuclear facilities are required to maintain a level of security unlike any other commercial enterprise in this country.

V. SUMMARY OF ARGUMENT

Pursuant to its authority and responsibility under the Atomic Energy Act of 1954, as amended (“AEA”), 42 U.S.C. § 2011, *et seq.*, the NRC has established a comprehensive regime of requirements for the physical security of nuclear facilities, including ISFSIs. The NRC has specifically reviewed those requirements following the events of September 11, 2001, and imposed substantial

Licensees, Order Modifying Licenses (Effective Immediately), EA-03-038, 68 Fed. Reg. 24,510 (May 7, 2003) (Ex. 54); All Operating Power Reactor Licensees, Order Modifying Licenses (Effective Immediately), EA-03-039, 68 Fed. Reg. 24,514 (May 7, 2003) (Ex. 58).

¹³ See Order Modifying Licenses (Effective Immediately), EA-02-104, 67 Fed. Reg. 65,150 (Oct. 23, 2002) (Ex. 49); Order Modifying Licenses (Effective Immediately), EA-02-104, 67 Fed. Reg. 65,152 (Oct. 23, 2002) (Ex. 51).

¹⁴ See 10 C.F.R. § 73.21.

new requirements. In this context, an expansion of NEPA to require threat assessments and reviews of physical security requirements is improper and unnecessary. While an exercise of AEA responsibility does not abrogate any NEPA responsibility that may exist, it is equally true that it is not necessary to improperly expand NEPA to address the issues of concern to Petitioners.

NEPA itself, by its terms, does not require consideration of terrorist attacks as an environmental assessment issue. Such a significant extension of the statute would seemingly be a matter that would be expressly addressed by Congress. Moreover, NEPA itself has always been read as being limited by a “rule of reason.” Under a “rule of reason,” the statute should not be stretched to require assessments of the risk of attacks by terrorists for at least four reasons.

First, the risk of terrorist attacks at any one facility is unpredictable and unquantifiable. At least two courts of appeals have addressed analogous issues and have specifically held that NEPA does not encompass unquantifiable sabotage risks. Moreover, such site-specific assessments would be of little practical value. They would inevitably become “worst case” analyses that could distort rather than aid decisionmaking. It has long been held by both the Supreme Court and this Court that NEPA does not require such exercises.

Second, under a “rule of reason,” it has been uniformly held that there must be a close causal relationship between a proposed federal action and potential

environmental effects. Federal licensing of a project cannot be reasonably construed as the proximate cause of the hypothetical consequences of a terrorist attack. The consequences of terrorist attacks are caused by terrorists, not by those that would build and license important infrastructure projects.

Third, a “rule of reason” should reflect that the defense of the United States is a federal, not private responsibility. In this light, in reviewing a single proposed project, agencies should be accorded the discretion to recognize that significant government-wide efforts are necessary to prevent terrorist attacks. This effort should be the focus of the government rather than expanded NEPA reviews of possible defensive measures that could be taken in isolation by a few private entities. The NRC has properly concluded that, in light of the national defense responsibility, any residual risk of an attack at any one facility remains speculative and therefore beyond the scope of NEPA.

Finally, as the government has urged in this case, plant-specific adjudicatory hearings are not an appropriate forum for reviewing sensitive threat information. While procedures could be put in place to close hearing sessions, this would not alleviate the concern.

With respect to Petitioners’ arguments that the NRC violated procedural requirements of the APA, Petitioners are equally incorrect. The NRC made its decision on the question of law related to the scope of NEPA in an

adjudication and applied that precedent to the DCPD case. Such an approach was within agency discretion under the APA and was consistent with the NRC's own procedures for adjudicatory hearings.

The NRC also in this case correctly denied Petitioners' extraordinary petition requesting that the NRC expand the scope of the site-specific hearing on the proposed ISFSI. To the extent that Petitioners sought to address possible new requirements for the entire DCPD site (including the power plant), they raised an issue clearly beyond the scope of the application before the NRC (and hence the scope of the hearing). To the extent Petitioners sought to address possible new requirements for the ISFSI, they raised a matter the NRC was choosing to address through an ongoing generic review. Petitioners specifically declined to utilize the procedural mechanisms available to them to participate in that process.

VI. STANDARD OF REVIEW

PG&E agrees with the Standard of Review as stated by Respondent NRC. In general, under section 706 of the APA, a court must uphold a final agency action unless that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see, e.g., Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1020 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 957 (2003). An agency, in particular, is accorded broad discretion in establishing and applying procedural rules. *See, e.g., Vt. Yankee Nuclear Power*

Corp. v. Natural Res. Defense Council, Inc., 435 U.S. 519, 543 (1978) (citations omitted) (“Absent constitutional constraints or extremely compelling circumstances the ‘administrative agencies “should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.””). Review of an agency action to determine its conformity with NEPA is also governed by the judicial review provisions of the APA. *See, e.g., Pub. Citizen*, 316 F.3d at 1020; *Anderson v. Evans*, 350 F.3d 815, 829 (9th Cir. Oct. 28, 2003), *amended by, reh’g en banc denied*, 350 F.3d 815 (9th Cir. Nov. 26, 2003).

VII. ARGUMENT

A. UNDER THE AEA THE NRC HAS ESTABLISHED ROBUST REQUIREMENTS FOR SECURITY AT COMMERCIAL NUCLEAR FACILITIES

The issues of concern to Petitioners regarding nuclear security are comprehensively addressed by the NRC under the AEA — in concert with the national security organizations of the federal government. After September 11, 2001, the NRC promptly exercised its authority under the AEA to increase security at nuclear facilities and to initiate a comprehensive review of security requirements. Based on these initiatives, the NRC concluded that nuclear facilities can be licensed and can continue to operate with no undue risk to public health and safety and not be inimical to the common defense and security. In this context, the assumption inherent throughout Petitioners’ arguments — that the Commission

must take up terrorism issues in connection with individual licensing actions, under the umbrella of NEPA, lest those issues be ignored — is unfounded. NEPA is an environmental statute, not a threat assessment statute. It does not by its terms mandate agencies to address security threats as part of environmental reviews, and such a mandate would be clearly unnecessary given the mandate of the AEA.

The AEA provides that the NRC is authorized to issue licenses in accordance with the rules and regulations it establishes to effectuate the purposes of the Act — namely, to “promote the common defense and security or to protect health or to minimize danger to life or property.” 42 U.S.C. § 2201(b). Pursuant to the AEA, no license may be issued by the NRC if it “would be inimical to the common defense and security or to the health and safety of the public.” *Id.* §§ 2133(d), 2134(d).

Pursuant to this statutory mandate and responsibility, the NRC has promulgated regulations governing ISFSIs, found in Title 10 of the *Code of Federal Regulations*. Specific security requirements for ISFSIs are set forth in 10 C.F.R. § 73.51. Among other requirements, an ISFSI must meet the general performance objectives set forth in 10 C.F.R. § 73.51(b), which provides, in pertinent part:

Each licensee subject to this section shall establish and maintain a physical protection system with the objective of providing high assurance that activities involving spent nuclear fuel and

high-level radioactive waste do not constitute an unreasonable risk to public health and safety.

See also 10 C.F.R. §§ 72.180 (requirement for a physical protection plan); 72.184 (requirement for a safeguards contingency plan).

Pursuant to 10 C.F.R. § 73.1(a)(1), and based on its judgments and its coordination with responsible government organizations, the NRC defines the postulated sabotage threats and adversary characteristics — collectively the “Design Basis Threat” or “DBT” — upon which licensee security programs must be based and for which licensees must provide protection. The DBT has been revised periodically by rulemaking and plant-specific orders, based on current events, emerging issues, and available intelligence (including after September 11, 2001, as described above).

In establishing security requirements, the NRC has long-recognized that, just as in any other enterprise, there is a division of responsibility between private entities and the government in protecting private facilities from enemy attack. The NRC’s regulations, 10 C.F.R. § 50.13, specifically provide that applicants and licensees are not required to design and build nuclear power plants to withstand the effects of “attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person.” While the NRC’s performance requirements for physical security, including the DBT, are independent of the identity, nationality

and ideology of a would-be attacker, the rationale for the NRC's regulation is that, ultimately, it is the responsibility of the United States government, not power reactor licensees, to defend against attacks by enemies of the United States. In *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778 (D.C. Cir. 1968), the court of appeals upheld the validity of 10 C.F.R. § 50.13 and affirmed that the Atomic Energy Commission — the predecessor to the NRC — had acted within its authority under the AEA when it excluded, from a construction permit proceeding for a nuclear power reactor, consideration of issues raising the possibility of enemy action and sabotage against a nuclear plant, such as a bombing attack from Cuba. *Siegel*, 400 F.2d at 784.¹⁵

¹⁵ Indeed, the Court specifically held that:

Congress certainly can be taken to have expected that an applicant for a license should bear the burden of proving the security of his proposed facility as against his own treachery, negligence, or incapacity. It did not expect him to demonstrate how his plant would be invulnerable to whatever destructive forces a foreign enemy might be able to direct against it in [the future].

Id. at 784. The Commission has noted that Section 50.13 “grew out of a policy judgment by the Atomic Energy Commission that it was our nation’s ‘settled tradition’ to ‘look[] to the military’ for defense against enemy attacks, and that it was ‘impracticable’ to expect a ‘civilian industry’ to provide the necessary defense.” *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-02-27, 56 NRC 367, 369 n.7 (quoting *Siegel*, 400 F.2d at 782). In *dictum* in *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 168 n.14 (2d Cir. 2004), the Court of Appeals for the Second Circuit noted

Consistent with NRC requirements, the physical security program for the DCPD ISFSI will be based upon the applicable DBT. The program has been approved by the NRC as consistent with current NRC regulatory requirements, and SLOMFP did not assert otherwise in the proposed contentions in the ISFSI licensing proceeding.¹⁶ Although PG&E will provide a robust security regime for the ISFSI just as it does for the power plant, it will not duplicate or replace the national defense capability.

Exercising its AEA responsibility, and as described above, the NRC has, after September 11, 2001, conducted a thorough re-evaluation of its security requirements and programs. In raising the issue of a possible terrorist attack on the proposed DCPD ISFSI, Petitioners are raising an issue that was specifically

that circumstances have changed since *Siegel* was decided and therefore the court did not find itself “compelled” to follow *Siegel*. However, the changes in circumstances do not change the fundamental distinction made in *Siegel* regarding federal versus private responsibility. The nature and perhaps even the degree of the threat may have changed since *Siegel* (although *Siegel* was decided during the Cold War and real threats did exist at that time). It remains, however, impractical and perhaps ill-advised for private entities to duplicate or replace the national defense function, especially absent specific Congressional action.

¹⁶ See SER, at § 10.1.6. (Addendum 12-13.) Indeed, the petitioners’ focus — as reflected in the extraordinary petition — was on *new* requirements.

considered as part of the NRC's review. From public sources, for example, it is clear that the NRC has considered the prospect of deliberate aircraft crashes into spent fuel storage casks — one of Petitioners' primary concerns. The Commission recently stated, in response to a comment on a proposal to approve a particular spent fuel storage canister design:

The Commission believes that the best approach to dealing with threats from aircraft is through strengthening airport and airline security measures. Consequently, we continue to work closely with the appropriate Federal agencies to enhance aviation security and thereby the security of nuclear power plants and other NRC-licensed facilities. . . . The NRC is conducting a comprehensive evaluation that includes consideration of potential consequences of terrorist attacks using various explosives or other terrorist techniques on dry storage casks. As part of this evaluation, the agency is looking at the structural integrity of dry storage cask systems and will consider the need for additional design requirements to enhance licensee security and public safety.

Final Rule, List of Approved Spent Fuel Storage Casks: Standardized NUHOMS®-24P, -52B, -61BT, -24 PHB, and -32 PT Revision, 69 Fed. Reg. 849, 852 (Jan. 7, 2004). The Commission has thus set its security and design standards for storage casks to address credible threats, yet taking into account aviation security measures that far transcend the reach of the NRC and its licensees.

Accordingly, the issue here is not whether terrorism and nuclear facility security must be considered; the issue here is whether terrorism and nuclear security must be addressed *again* in a site-specific ISFSI adjudicatory hearing

under NEPA. The Commission has in fact addressed, and continues to address, the security issues of concern to Petitioners through its AEA-based comprehensive review and enhancement of its security requirements. The Commission does so in a holistic context, based upon the threat information available to this country's intelligence community and recognizing a limit on what can and should be expected from any private entity. The Commission has concluded — given the events of September 11, 2001 and the subsequent measures taken by the NRC as well as other organizations — that nuclear facilities can continue to be licensed and can operate without undue risk. This context provides foundation for the Commission's conclusion that further evaluation of security issues in individual licensing cases under the rubric of NEPA is not mandated by that environmental statute and is not needed.

San Luis Obispo County (the "County"), in its *amicus* brief filed on March 22, 2004, argues that the NRC could have developed "a set of realistic mitigating measures" had it not rejected the NEPA terrorism contentions. (County Br. at 9.) The fact is, however, that the specific concerns and mitigation measures proposed by the County could be, and undoubtedly have been, considered by the NRC in the context of its ongoing comprehensive AEA security review. While compliance with the AEA does not excuse any obligation under NEPA that may

exist, it is also not necessary to inappropriately stretch the scope of NEPA to assure that security and “mitigating measures” are considered and addressed.

The County in its brief includes excerpts from an environmental impact report (“EIR”) prepared for the County during the process for evaluating PG&E’s application for a coastal development permit for the DCPD ISFSI. (*Id.*) In that report the County’s contractor clearly strayed into areas of radiological safety and security that even the County now recognizes are preempted by the AEA and are exclusively the domain of the NRC. (*Id.*, n.5.) The County’s contractor, acting in complete isolation from the federal government, unilaterally deemed various scenarios “feasible” and therefore proposed mitigation measures to address a hypothetical “attack by airplane.” (*Id.* at 10.) All of this is offered to demonstrate what *could be* done in a NEPA evaluation. It does not demonstrate, however, that the NRC has failed to consider similar scenarios under the AEA or that *NEPA mandates* such a public discussion.

Furthermore, the County’s suggested mitigation measures would have PG&E, a private entity, take extraordinary measures in the area of security, particularly with regard to aircraft attacks. Such measures would extend beyond what the NRC has required for any other facility and would exceed what is required with respect to any other critical infrastructure activity in this country. Such extraordinary measures would cross the long-recognized dividing line

between the responsibilities of private entities and the government with respect to national defense. The County claims that “the NRC has left the County’s citizens wondering whether it has taken all reasonable steps to deal with the threat of terrorism.” (County Br. at 11.) In fact, however, it is the County that is creating undue fear on a topic beyond its legal authority and beyond its expertise.

B. NEPA DOES NOT REQUIRE CONSIDERATION OF TERRORIST ATTACKS AS AN ENVIRONMENTAL ASSESSMENT ISSUE

Petitioners primarily seek reversal of the Commission’s decision in CLI-03-1, which squarely addressed the issue of whether NEPA requires an assessment of the risks and environmental consequences of terrorist attacks on a facility in connection with the federal licensing of that facility. In CLI-03-1 the Commission applied the precedent that it had established in the *PFS* case, CLI-02-25, 56 NRC 340 (2002) (Ex. 1), on the same issue. The Commission concluded that NEPA does not mandate such assessments. The Commission decision was correct as a matter of law for several separate and sufficient reasons.

1. NOTHING IN THE PLAIN LANGUAGE OF NEPA OR ITS LEGISLATIVE HISTORY SUGGESTS THAT ASSESSMENT OF TERRORISM THREATS IS PART OF A NEPA REVIEW

Nothing in the plain language of NEPA compels consideration in an environmental assessment of the likelihood and potential impacts of sabotage or terrorist attacks at a particular proposed facility. Section 102(2)(C)(i) requires only that agencies of the federal government “include in every recommendation or

report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement . . . on the environmental impact of the proposed action.” 42 U.S.C. § 4332(2)(C)(i). The focus is entirely on the “environmental impacts” *of the project*; there is no mention of threat assessment or security.

Moreover, nothing in the legislative history of NEPA indicates that Congress intended to require agencies to consider the likelihood and potential consequences of acts of sabotage or terrorism.¹⁷ The legislation was first introduced as S. 1075. The language requiring agencies to prepare a “detailed statement” on environmental impacts was added in an amendment to S. 1075 on October 8, 1969. *See* 115 CONG. REC. 29,066, 29,087-29,088 (1969). The conference committee report does not elaborate on the requirement. *See* H.R. CONF. REP. NO. 91-765 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2751, 2767. The report does not contain any language suggesting that Congress intended agencies to consider security threats or the consequences of acts of sabotage or terrorism.

Absent any clear statutory direction, or even suggestive legislative history, NEPA should be construed consistent with a natural reading of its terms. To read NEPA to include a requirement for an assessment of the risks and impacts

¹⁷ *See, e.g.,* S. REP. NO. 91-296, at 2 (1969).

of the destruction of a proposed project in a deliberate terrorist attack, act of sabotage, or act of war, would be a clear, undue, and unnecessary expansion of the statute — *particularly given that the issue is already addressed under the AEA*. The Commission’s conclusion in CLI-03-1 (and in the underlying *PFS* decision) was reasonable and consistent with the law as enacted by Congress.

Indeed, even if one were to look beyond the logical limitation on NEPA based on a common-sense approach to defining “environmental impacts of a proposed project,” the scope of a NEPA review has always been read as limited by a “rule of reason.” *See, e.g., Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 958 (9th Cir. 2003) (citations omitted) (“‘We review an EIS under a rule of reason to determine whether it contains a “reasonably thorough discussion of probable environmental consequences.”’”). The assertion that NEPA mandates consideration of intentional malevolent acts of terrorists in connection with the federal licensing of a project should be rejected under the “rule of reason” for several reasons, each discussed below.

2. THE NEPA RULE OF REASON DOES NOT REQUIRE THE NRC TO CONSIDER UNQUANTIFIABLE RISKS OF UNPREDICTABLE ACTS OF SABOTAGE

Applying a “rule of reason,” NEPA should not be construed to require an assessment of unquantifiable risks of hypothetical scenarios of terrorism or sabotage. Notwithstanding the events of September 2001, the risks associated with

such scenarios at any one nuclear facility are still neither quantifiable nor predictable, particularly given the substantially increased security at nuclear plants and given the aggressive measures of the United States to address the terrorism risk since September 2001.

In its *PFS* decision, the Commission stated:

Any attempt at quantification or even qualitative assessment would be highly speculative. In fact, the likelihood of attack cannot be ascertained with confidence by any state-of-the-art methodology. That being the case, we have no means to assess, usefully, the risks of terrorism at the PFS facility. Risk, of course, is generally thought of as “the product of the probability of occurrence [and] the consequences.” Here, though, we have no way to calculate the probability portion of the equation, except in such general terms as to be nearly meaningless.

CLI-02-25, 56 NRC at 350 (alteration in original) (citation omitted). (Ex. 6.) The Commission went on to actually point out its judgment (“[i]f we were to speculate”) that the probability of a scenario of a hijacked jumbo jet hitting a particular ISFSI “is actually minuscule.” *Id.* at 351. (Ex. 6.) Among other bases offered for this judgment, the Commission noted the enhanced anti-hijacking measures put in place by the Federal Aviation Administration at airports and on commercial airplanes, and increased intelligence efforts to prevent potential attacks before they occur. *Id.* at 351. (Ex. 6.)¹⁸

¹⁸ In *Riverkeeper, Inc. v. Collins*, the Court of Appeals for the Second Circuit emphasized the seriousness of and emotion surrounding similar concerns

The Commission's rationale for excluding unquantifiable sabotage risks from NEPA evaluations is consistent with the decision of the Third Circuit Court of Appeals, affirming, in relevant part, an earlier NRC decision.¹⁹ See *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989). In *Limerick Ecology Action*, the court specifically found that the NRC was *not* required by NEPA to entertain in a licensing hearing an environmental contention on "sabotage risk." *Id.* at 743. The petitioner in *Limerick Ecology Action* argued that the NRC's refusal to consider the risk of sabotage, either in the Final Environmental Statement for a power reactor or as a contention in the reactor licensing proceeding, violated NEPA. *Id.* at 723. The court rejected this argument because the petitioner had failed to rebut the NRC's conclusion that "sabotage risk analysis is beyond current probabilistic risk assessment methods." *Id.* at 743.²⁰ To have

raised by the petitioners in that case, but acknowledged that it is the NRC, not the courts that ultimately "must decide the difficult questions concerning nuclear power safety." 359 F.3d 156, 171 (2d Cir. 2004) (quoting *County of Rockland v. NRC*, 709 F.2d 766, 768 (2d Cir. 1983)).

¹⁹ *Phila. Elec. Co.* (Limerick Generating Station, Units 1 & 2) (hereinafter "*Phila. Elec. Co.*"), ALAB-819, 22 NRC 681 (1985), *aff'g Phila. Elec. Co.*, LBP-84-31, 20 NRC 446 (1984). The Commission subsequently affirmed the Appeal Board's decision by declining to review it. *Phila. Elec. Co.*, CLI-86-5, 23 NRC 125 (1986).

²⁰ See also *Phila. Elec. Co.*, ALAB-819, 22 NRC at 699. In so ruling, the Third Circuit affirmed the NRC's conclusion that assessment of such risks was "attended by a great deal of uncertainty," thereby satisfying NEPA's

prevailed, the petitioner would have had to present “some method or theory by which the NRC could have entered into a meaningful analysis of the risk of sabotage despite its asserted inability to quantify the risks.” *Id.* at 744. No such method or theory was presented in that case. And no such method or theory was presented in this case. Certainly, nothing was offered by the petitioners below in their proposed contentions to suggest that the specific, incremental terrorism risk at the DCPD ISFSI would be quantifiable.

Similarly, the Second Circuit Court of Appeals has declined to invalidate a Department of Transportation (“DOT”) rule designed to reduce the risk of transportation of large quantities of radioactive materials by highway where, among other things, the agency determined that an EIS was not necessary. *City of N.Y. v. U.S. Dep’t of Transp.*, 715 F.2d 732 (2d Cir. 1983). With respect to the risk of sabotage, the court of appeals reversed the district court’s finding that DOT ““was obligated to state its view on the probability of such an event, even if that view was only that no estimate could reasonably be made.”” *Id.* at 750 (quoting *City of N.Y. v. U.S. Dep’t of Transp.*, 539 F. Supp. 1237, 1271 (S.D.N.Y. 1982)). The court of appeals stated:

requirement that the agency take a “hard look” at the issue. *Limerick Ecology Action*, 869 F.2d at 743.

With respect to environmental consequences that are only remote possibilities, an agency must be given some latitude to decide what sorts of risks it will assess. Here DOT simply concluded that the risks of sabotage were too far afield for consideration. To a large degree this judgment was justified by the record. Substantial evidence indicated that sabotage added nothing to the risk of high-consequence accidents. Even the least sanguine commentators could say only that sabotage added *an unascertainable risk*. In light of these conflicting points of view, it was within DOT's discretion not to discuss the matter further beyond adopting the NRC security requirements.

City of N.Y., 715 F.2d at 750 (citations omitted) (emphasis added). The NRC too should be given similar latitude and be accorded appropriate deference with respect to its judgments on the speculative and unascertainable risks of specific events at specific sites.

It is also well established that NEPA does not require a "worst case" analysis of potential environmental effects, because such analysis "distort[s] the decisionmaking process by overemphasizing highly speculative harms." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989). *See also Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026-27 (9th Cir. 1980) (observing, in concluding that the environmental impact of a dam failure caused by a catastrophic earthquake need not be discussed in an EIS, that "[e]veryone recognizes the catastrophic results of the failure of a dam; to detail these results would serve no useful purpose"). Similarly, evaluations of highly speculative "worst case" scenarios involving terrorist attacks could overemphasize the risks of

such attacks *at a particular nuclear facility* and distort the decisionmaking process. If NEPA does not require assessments of hypothetical, catastrophic dam failures, it should not require the NRC to dream up “worst case” attack scenarios of uncertain likelihood, simply to assess speculative consequences and fanciful mitigating measures.

The practical value of such “worst case,” unquantified analyses would be particularly limited given the lack of any means to compare the overall risk of such scenarios to similar attacks on other hypothetical targets (or even to other risks in society). The results of such assessments would vary greatly depending upon the assumptions used and could simply paralyze decisionmaking. Should an agency deny a license for an important project because of an unquantifiable risk? To what end? In the end this would have little overall effect on terrorism risk. Myriad other hypothetical “targets” — all significantly less protected than nuclear facilities — would still exist. Should an agency consider mitigation measures for speculative risks that cannot be measured against any accepted standards? Under such an approach, mitigation measures could be endlessly reviewed, in the isolated context of an individual case, to the limits of the imagination.²¹ Specific nuclear

²¹ One alternative that the County suggests, based upon an extra-record reference (County Br. at 9, n.6), is an underground ISFSI such as PG&E has proposed for Humboldt Bay Power Plant (“HBPP”). HBPP is a long-shutdown facility (it was last operated in 1976) with a very limited amount

industry applicants, such as PG&E, could be driven to design and “harden” their facilities to standards that exceed those determined necessary under the AEA and those applied to any other commercial or industrial activity in the United States.²²

The arguments that were presented by the petitioners below to support the terrorism contentions certainly did not establish a specific or unique terrorist risk for the DCPD ISFSI, nor did they establish how to quantify or meaningfully assess the risks. Petitioners now argue only that the NRC’s conclusion in the present case is inconsistent with the NRC’s 1994 “Vehicle Bomb Rule.”²³ (Pet’r Br. at 40-41.) In this rulemaking, the NRC amended the DBT to require protection against malevolent use of vehicles at nuclear power plants. Petitioners argue that this rule “unequivocally demonstrates that the Commission has means of making a meaningful evaluation of the potential for terrorist attacks.” (*Id.* at 40.) While the

of very “old and cold” spent fuel. Underground storage raises technical issues involving, among other things, cooling of the canisters. The situation at HBPP is very different from DCPD and the reasons underground storage was selected have nothing to do with terrorism (seismic considerations and aesthetics being the primary factors).

²² As correctly pointed out by the Nuclear Energy Institute (“NEI”) in their *amicus* brief, these “worst case” scenarios would, in effect, involve “an assigned 100% probability of a successful attack and a speculative assessment of its consequences, [and] would grossly overstate the risk posed by terrorism and impermissibly distort the decisionmaking process.” (NEI Br. at 24.)

²³ See Final Rule, Protection Against Malevolent Use of Vehicles at Nuclear Power Plants, 59 Fed. Reg. 38,889 (Aug. 1, 1994). (Ex. 14.)

Commission in that rule determined, based on then-recent experience, to upgrade the DBT requirement, it did *not* determine that it could quantify likelihood of terrorist attacks. The NRC specifically noted in the rulemaking that it had examined the use of probabilistic risk assessment (“PRA”) to predict sabotage as an initiating event and had concluded that its use “would *not* be credible or valid because terrorist attacks, by their very nature, may not be quantified.” 59 Fed. Reg. at 38,890 (emphasis added). (Ex. 15.)²⁴ The NRC further stated that even the conclusions in then-recent National Intelligence Estimates “are not presented in terms of quantified probability but recognize the unpredictable nature of terrorist activity in terms of likelihood.” *Id.* (Ex. 15.) Petitioners argue that the NRC “performed a conditional probabilistic analysis” to evaluate the vulnerability of a power plant to a vehicle bomb. (Pet’r Br. at 40.) However, the sentence in the NRC’s rulemaking directly prior to the one relied on by Petitioners states: “The NRC does not believe that it can quantify the likelihood of vehicle bomb attack.” 59 Fed. Reg. at 38,891. (Ex. 16.) The rulemaking, therefore, is entirely consistent

²⁴ The NRC also stated that past attempts to apply PRA techniques to acts of sabotage had resulted in similar findings, citing as examples the 1978 Risk Assessment Review Group Report to the U.S. Nuclear Regulatory Commission (NUREG/CR-0400), the 1975 Reactor Safety Study (WASH-1400), the 1983 Policy Statement on Safety Goals for the Operation of Nuclear Power Plants, 48 Fed. Reg. 10,772 (Mar. 14, 1983), and a 1991 petition to institute an individual plant examination program for threats beyond the design basis. *See* 59 Fed. Reg. at 33,890. (Ex. 15.)

with the NRC's conclusion in the present case that terrorist risks cannot be quantified and that a risk assessment under NEPA is not necessary under the logic of *Limerick Ecology Action*.²⁵

The NRC has — in effect — concluded that a generalized risk exists; that measures therefore should be required under the AEA for nuclear facilities to protect themselves from credible threats; and that the federal government must additionally be held responsible to detect, prepare for, prevent, and protect against terrorist attacks in the United States. Against this backdrop, it is not possible to quantify the unpredictable residual risk that might exist at any one proposed facility. Under a “rule of reason,” NEPA does not compel further assessments of such risks in environmental reviews.

3. THE NEPA RULE OF REASON DOES NOT REQUIRE AN ASSESSMENT OF TERRORISM CONCERNS THAT LACK A CLOSE CAUSAL CONNECTION TO THE NRC LICENSING ACTION

Under the “rule of reason,” it is also clear that NEPA does not require the NRC to consider any and all environmental impacts that may conceivably be traced to an agency action. The scope of impacts of a project that must be considered is limited by a reasonable causal nexus between the project and the

²⁵ Petitioners also argue that *PFS* also reveals that the NRC “has been conducting *exactly* the type of analysis of which it claims to be incapable.” (Pet’r Br. at 41). This is simply a mischaracterization. Nothing in that decision supports the idea that terrorist risks can be quantified.

impacts. Intentional malevolent acts of terrorists, by their very nature, cannot be construed to be either “direct effects” or “indirect effects” of an NRC licensing action. Such attacks would not be caused by the licensing action. Rather, such attacks would involve malicious acts by third parties. Given this external, malicious involvement, the consequences of such attacks cannot reasonably be viewed as being proximately linked to the NRC’s licensing activities.²⁶

In *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), the Supreme Court found that, to be within the scope of a NEPA review, there must be a close causal relationship between potential environmental effects and the proposed federal action. The Court emphasized that “we must look at the relationship between [the] effect and the change in the physical environment caused by the major federal action at issue.” *Id.* at 773. The Court wrote:

Some effects that are “caused by” a change in the physical environment in the sense of “but for” causation, will nonetheless not fall within [NEPA] § 102 because the causal chain is too attenuated. . . .

Our understanding of the congressional concerns that led to the enactment of NEPA suggests that the terms “environmental effect” and “environmental impact” in § 102 be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue.

²⁶ Cf. 40 C.F.R. § 1508.8. Under this regulation, the “direct effects” and “indirect effects” are those “caused by the action.”

This requirement is like the familiar doctrine of proximate cause from tort law.

Id. at 744; *see also Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1163 (9th Cir. 1998) (finding neither arbitrary nor capricious a decision of the National Park Service not to consider the “remote” environmental effects on a historic private clubhouse that might result from the economic impact of competition from the new public clubhouse due to lack of a close causal nexus).

Here, the risk of a terrorist attack on the ISFSI is not an effect of the licensing action. The risk of terrorist attacks already exists — somewhere and everywhere. The hypothetical consequences of a terrorist act also are not “effects” or “impacts” of the NRC’s licensing action. Such consequences would be caused by terrorists, not the NRC. The relationship between the licensing action for one facility and the effects of an attack is attenuated at best, and certainly beyond any reasonable sense of “proximate cause.” As the Commission rightly pointed out in its *PFS* decision, absent such a distinction, “the NEPA process becomes truly bottomless, subject only to the ingenuity of those claiming that the agency must evaluate this or that potential adverse effect, no matter how indirect its connection to agency action.” CLI-02-25, 56 NRC at 350. (Ex. 6.)

In *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1385-86 (9th Cir. 1988), this Court addressed a similar issue. The case concerned the proposed construction of radio towers as part of a system for

sending messages to strategic forces during and after nuclear war (Ground Wave Emergency Network, or “GWEN”). *Id.* at 1381. The No GWEN Alliance argued that the Air Force’s environmental reviews for the projects were inadequate because they failed to discuss environmental impacts of the project, including the impact of a nuclear war that might be provoked by the installation or use of the message system. *Id.* No GWEN presented witnesses to testify that the area in which the GWEN tower would be located would be a priority target. *Id.* at 1381-82. However, finding the contention that GWEN would be a priority target in a nuclear war to be speculative, the Court held that “the nexus between construction of GWEN and nuclear war is too attenuated to require discussion of the environmental impacts of nuclear war in an environmental assessment or environmental impact statement.” *Id.* at 1386.²⁷ In the present case there never has been any basis presented to suggest that the DCPD ISFSI would be a priority target, as opposed to countless other hypothetical targets (including many

²⁷ Similarly, in *Conservation Law Found. of New Eng. v. U.S. Dep’t of Air Force*, the Court found that NEPA does not require consideration of the effects of nuclear war purportedly caused by the major Federal action under review — because the plaintiff had failed to establish any “close causal relationship” between the two, and because the risk of nuclear war is not an environmental effect under NEPA. 1987 U.S. Dist. LEXIS 15149, at *10-11 (D. Mass. 1987) (quoting *Metro. Edison*, 460 U.S. at 774). The case concerned the construction of five radio towers in New England that were to become part of the GWEN system.

significantly less protected). In any event, the causal connection between licensing and a terrorist attack would be insufficient under Section 102 of NEPA and the Court's logic in *No GWEN*.²⁸

In the present situation, the postulated terrorist attacks at the proposed ISFSI are certainly not inevitable as a consequence of construction of the facility. Postulated attacks would specifically involve the intentional, intervening acts of third parties. Although not dealing with terrorists, at least one court of appeals has held that theoretical criminal third party acts lacked the requisite nexus to a proposed action to require analysis under NEPA. In *Glass Packaging Inst. v. Regan*, the Court of Appeals for the District of Columbia Circuit rejected a

²⁸ The limit on the scope of indirect effects to be analyzed under NEPA is also reflected in cases such as *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197 (1st Cir. 1999). Appellants in that case challenged a determination of the Federal Highway Administration that changes to a state highway project did not require preparation of a supplemental EIS. *Id.* at 199. Among other things, they claimed that airport expansion was an indirect effect of the extension of a service road as one part of the highway project. *Id.* at 205. The court of appeals upheld the district court's finding that possible airport expansion was "contingent on several events that may or may not occur over an eight-year span." *Id.* at 206. These events included "the acquisition of permits, the arrangement of funding, [and] the drafting of expansion plans." *Id.* In the view of the court, these contingencies rendered "any possibility of airport expansion speculative and . . . neither imminent nor inevitable." *Id.* As a result, the Federal Highway Administration was not required to address expansion in its cumulative impact analysis, as it did not qualify as an indirect effect. *Id.*; see also *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 433 (10th Cir. 1996).

challenge to an environmental review prepared by the Bureau of Alcohol, Tobacco and Firearms in connection with a decision to allow the packaging of liquor in plastic bottles. 737 F.2d 1083, 1084, 1091-94 (D.C. Cir. 1984), *overruled in part on other grounds by Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 283 n.2 (D.C. Cir. 1988). The appellants argued that the environmental review was flawed for its failure to consider the potential injury or death that could result from criminal tampering with the plastic bottles. *Glass Packaging Inst.*, 737 F.2d at 1091. The court rejected this claim, on the grounds that the potential for tampering with the bottles — a criminal act by a third party — implicated “[n]o cognizable *environmental* effect.” *Id.* at 1091 (emphasis in original). The court found that including the potential effects of criminal tampering would impermissibly dilute the policies served by NEPA. *Id.* For analogous reasons, neither criminal acts nor acts of war would implicate environmental effects cognizable under NEPA.

Petitioners argue that “[t]he Commission’s ruling is inconsistent with the agency’s own long-established policy and practice of addressing the environmental impacts of external events in accident analyses conducted under NEPA.” (Pet’r Br. at 43.) Petitioners would equate terrorist activities to equipment failures or external events such as tornados, floods, earthquakes, and explosions at adjacent facilities. (*Id.* at 44.) There is, however, in reality no

comparison. As the Commission correctly noted in its *PFS* decision, the risk of equipment failures and external events such as natural phenomena are — unlike acts of terrorism and sabotage — quantifiable based on past experience. *See* CLI-02-25, 56 NRC at 347, n.18. (Ex. 4.) (As discussed above, the NRC suggested that the likelihood of an attack by a hijacked commercial jet at one facility might be characterized as “minuscule.” *Id.* at 351. (Ex. 6.)) Terrorist attacks are also fundamentally different from any of those scenarios; they are acts of enemies of the United States. They are the focus and responsibility of the national defense, not of private entities.

While it may be indisputable that there is currently a “risk” of an attack on a nuclear plant, the mere existence of that risk does not trigger a NEPA responsibility to address possible environmental consequences of such an attack in connection with approval of one ISFSI license. The effects of a terrorist attack would not be a consequence of the NRC’s licensing action; they would be the consequence of an act of a terrorist. Given this lack of a close causal nexus, under a “rule of reason” NEPA does not require that the risk and consequences of terrorist attacks be considered.

**4. THE NEPA RULE OF REASON SHOULD RECOGNIZE THE
DIVISION OF RESPONSIBILITY REFLECTED IN 10 C.F.R. § 50.13**

As discussed above, the NRC has developed detailed security requirements based on a DBT. The DBT has evolved over time based on the

NRC's and the federal government's threat assessments. Indeed, the DBT has evolved significantly since September 11, 2001. The DBT clearly addresses scenarios that the NRC has determined to be: (1) "credible" *and* (2) within the ambit of what a private entity can be required to address. *See, e.g.*, 10 C.F.R. § 50.13. In establishing the DBT, the NRC clearly presumed that the federal government will take action to prevent other, "beyond-design-basis," threats. As discussed in the *PFS* case, the scenario of terrorist attacks by aircraft is one for which the NRC specifically relies upon actions of the government to prevent enemies from gaining control over airplanes. Under a NEPA "rule of reason," this division of responsibility between the private and public sectors (reflected in 10 C.F.R. § 50.13) must be an important consideration.²⁹

²⁹ In promulgating 10 C.F.R. § 50.13, the Commission specifically underscored the division of responsibility:

The protection of the United States against hostile enemy acts is a responsibility of the nation's defense establishment and of the various agencies having internal security functions. The power reactors which the Commission licenses are, of course, equipped with numerous features intended to assure the safety of plant employees and the public. . . . One factor underlying the Commission's practice in this connection has been a recognition that reactor design features to protect against the full range of the modern arsenal of weapons are simply not practicable and that the defense and internal security capabilities of this country constitute, of necessity, the basic "safeguards" as respects possible hostile acts by an enemy of the United States.

Petitioners argue that compliance with NEPA is “independent of” the AEA responsibility. (Pet’r Br. at 51.) The County argues that the Commission is trying to “have it both ways,” in taking actions under the AEA to address terrorist risks at the same time it chooses not to address those risks under NEPA. (County Br. at 6.) The AEA and NEPA are indeed separate responsibilities, with the latter largely procedural in nature. The fact that NEPA is independent of the AEA, however, does not create a responsibility in and of itself — any responsibility under NEPA must still derive from a reasonable reading of the scope of NEPA. And, the fact that the NRC is addressing security under the AEA does not compel it to do so under NEPA as well. The NRC’s actions under the two statutes are not inconsistent; rather, the NRC’s differing actions simply reflect the differing scopes of the two statutory schemes.

The Commission has adopted a sound policy. Under the AEA it addresses security to the point where it can conclude, with reasonable assurance, that a nuclear facility can be operated with no undue risk to public health and safety and the common defense and security. *See, e.g.*, 42 U.S.C. §§ 2133(d), 2134(d). In establishing safety requirements, even to address natural phenomena

Exclusion of Attacks and Destructive Acts by Enemies of the U.S. in Issuance of Facility Licenses, 32 Fed. Reg. 13,445 (Sept. 26, 1967) (preamble accompanying publication of the final rule promulgating 10 C.F.R. § 50.13) (emphasis added).

such as earthquakes, the NRC cannot reduce risk to zero. Courts have long held that NEPA evaluations do not extend to the environmental consequences of beyond-design-basis scenarios that are remote and speculative. *See Deukmejian v. NRC*, 751 F.2d 1287, 1300, 1301 (D.C. Cir. 1984), *vacated in part*, 760 F.2d 1320 (1985), *aff'd on reh'g en banc*, 789 F.2d 26 (1986). Similarly, with respect to security, the NRC establishes requirements that set a level of security such that any residual risks, including the risk of attacks at an individual site, are remote and speculative. Here, as discussed in the *PFS* decision, the NRC has relied both upon its requirements imposed on licensees *and the overall actions of the federal government* to conclude, in effect, that further scenarios are speculative. A further NEPA process-driven review is unwarranted.

Indeed, in *Deukmejian* the court of appeals specifically described the extensive design and retrofitting at DCPD to address earthquake hazards. Based on these design considerations (directly analogous to the DBT/§ 50.13 analysis in this case), the court concluded that “[w]e must assume, therefore, that the likelihood that an earthquake will trigger a nuclear accident at the facility is so small as to be rated zero.” *Id.* at 1304. In an analogous way in the present case, after taking into account the existing private security and the efforts of the national defense organizations, the residual risk is low enough, according to the Commission (“minuscule”), that further evaluation under NEPA is unnecessary. Any such

evaluations would almost inevitably intrude into the sphere of responsibility that is public, not private.³⁰

The States of California, Massachusetts, Utah, and Washington (the “States”), in their brief as *amici*, present an argument that principally revolves around the statements of various government officials and related press accounts. These anecdotes, the States assert, “indicate that, at a minimum, it is inevitable that a terrorist attack will be attempted against at least one American nuclear facility” and that the Commission’s decision would “foreclose public discussion of a threat that senior government officials have determined to be realistic and substantial.” (States Br. at 12.) This argument, however, overstates the site-specific risk,³¹ ignores the mandate of the AEA by which the Commission has addressed the issues of concern, fails to credit the multi-faceted response of the government to the very risk noted in the various reports cited, and avoids the logical or “reasonable” limits on the scope of a NEPA *environmental* analysis. While

³⁰ NEI correctly observes that “[i]n performing the review [under NEPA] the NRC would need to step into the shoes of the security agencies and examine — and allow litigation of — military and law enforcement plans to defend against terrorism, highly sensitive intelligence assessments, and potential foreign policy decisions that could bear on whether plots against the United States would be initiated in the first place.” (NEI Br. at 17.)

³¹ Certainly, none of the materials cited addressed the DCPD ISFSI as a particular “inevitable” target. *See also* NEI Br. at 20, n.13.

terrorist attacks may be foreseeable events, successful attacks with environmental consequences remain speculative scenarios under NEPA.

Underscoring the rationality of its approach, the NRC is not alone among federal agencies in the view that consequences of terrorist attacks are not impacts that can be meaningfully considered in an environmental assessment under NEPA. The Federal Energy Regulatory Commission (“FERC”), the agency with the responsibility to license hydroelectric generating facilities and interstate gas and electric transmission facilities — also critical elements of our nation’s energy infrastructure — has reached conclusions following the events of September 11, 2001 similar to those of the NRC. In *Iroquois Gas Transmission, L.P.*, 98 FERC ¶ 61,273 (2002), FERC addressed a request under the Natural Gas Act for a certificate of public convenience and necessity in connection with a pipeline project. *Id.* at 62,076. One party argued that, in light of the events of September 11, 2001, “the public interest demands that the Commission reconsider the final EIS to further evaluate the risk of terrorist acts and ensure that every possible security measure has been undertaken before the pipeline is located adjacent to key support structures for two New York bridges.” *Id.* at 62,078. In response, FERC stated as follows:

24. The Commission agrees that the attacks of September 11, 2001, have changed the way pipeline operators as well as regulators must consider terrorism, both in approving new projects and in operating existing facilities. However, the

likelihood of future acts of terrorism or sabotage occurring on the proposed pipeline, or at any of the myriad natural gas pipeline or energy facilities throughout the United States is unpredictable given the disparate motives and abilities of terrorist groups. The continuing need to construct facilities to support the future natural gas pipeline infrastructure is not diminished because of the threat of any such future acts. Moreover, the unpredictable possibility of such acts does not support a finding that this particular pipeline should not be constructed. . . .

25. Increased security awareness has occurred throughout the industry and the nation. Following September 11, President Bush established the Office of Homeland Security with the mission of coordinating the efforts of all executive departments and agencies to detect, prepare for, prevent, protect against, respond to, and recover from terrorist attacks within the United States. The Commission in cooperation with other Federal agencies and industry trade groups have joined in the efforts to protect the energy infrastructure. We believe that the concerns raised . . . fall within the scope of these ongoing efforts to protect the more than 300,000 miles of interstate natural gas transmission pipeline.

Id. at 62,079.³² See also *Northwest Pipeline Corp.*, 99 FERC ¶ 61,083, 61,350 (2002); *Millennium Pipeline Co.*, 100 FERC ¶ 61,277, 62,169 (2002).

The NRC's approach is comparable. The NRC has a duty under the AEA to assure the safety and protection of nuclear facilities — and it has met and continues to meet that duty. NRC licensees such as PG&E devote substantial

³² FERC in this case ordered its staff to conduct a further technical conference, to address safety and security recommendations. This action is comparable to the actions the NRC has taken under its organic statute, the AEA.

resources to the physical security of their nuclear assets. The NRC and PG&E, however, both must mutually rely on the intelligence organizations and the national defense to further protect these facilities — just as countless other entities depend upon these capabilities (beginning from a much lower level of self-protection) to protect their skyscrapers, subway systems, non-nuclear power plants, chemical plants, and theme parks. A NEPA “rule of reason” does not encompass or mandate case-by-case reviews, each in isolation, of additional measures for protecting a small subset of our national infrastructure from terrorist attack.

5. *A PUBLIC HEARING PROCESS IS NOT AN APPROPRIATE FORUM FOR DISCUSSION OF SENSITIVE SECURITY ISSUES*

A fundamental theme of Petitioners and the *amici* in seeking to improperly insert security issues into an NRC licensing proceeding — either by force-fitting security into the scope of NEPA reviews or by expanding the scope of the proceeding as suggested in the extraordinary petition filed with the Commission — is to expand public participation with respect to these issues. This theme, however, runs contrary to law and policy. As a matter of policy, wide public discussion of the details of security issues is appropriately disfavored by the Commission. (Resp’t Br. at 44-46.) While procedures may be put in place to close hearing sessions, this would not alleviate the concern regarding the dissemination of threat and security information.

Section 102 of NEPA states that its policies should be applied only “to the fullest extent *possible*.” 42 U.S.C. § 4332 (emphasis added). Moreover, NEPA Section 101(b) requires agencies to implement the statute’s policies using “all practicable means, consistent with other essential considerations of national policy.” 42 U.S.C. § 4331(b). As the Commission stated in *PFS*, “NEPA does not override [the agency’s] concern for making sure that sensitive security-related information ends up in as few hands as practicable.” CLI-02-25, 56 NRC at 355. (Ex. 8.) “[A] full-scale NEPA process [regarding the risks of terrorism] inevitably would require examination not only of how terrorists could cause maximum damage but also of how they might best be thwarted. But keeping those kinds of information secret is vital.” *Id.* (Ex. 8.)

Furthermore, the level of required public participation is ultimately a matter defined by the APA. As discussed more fully below in connection with the petition to expand the licensing proceeding, the Commission was under no obligation to expand a site-specific adjudication on a proposed ISFSI simply because there is interest in security issues — related to the power plant as well as the ISFSI — that could be addressed by other procedures consistent with the APA. Hearing rights ultimately flow from the regulatory procedure selected by the Commission. The Commission in this case correctly provided for a hearing on those issues appropriately within the scope of the ISFSI application, and allowed

public participation on issues beyond the scope of the application by other appropriate regulatory procedures.

C. THE NRC ACTED WITHIN THE APA AND AEA IN DECIDING THE *PFS* CASE AND SUBSEQUENTLY APPLYING THE PRECEDENT TO THE DCPD CASE

Petitioners also seek reversal of CLI-03-1 on purely procedural grounds. As discussed above, in CLI-03-1 the Commission applied the recent precedent established in the *PFS* case, CLI-02-25, 56 NRC 340 (2002) (Ex. 1). Petitioners argue that, in CLI-03-1, and in the earlier *PFS* case, the NRC set a “binding substantive norm” that is subject to the public participation requirements of the APA. (Pet’r Br. at 37.) Petitioners argue that, because the NRC established the policy on the treatment of NEPA terrorism contentions without seeking public comment, the policy must be overturned as invalid. (*Id.*) However, it is this argument that is without merit.

Absent a statutory mandate to use rulemaking procedures, the decision to proceed by rulemaking or adjudication³³ is a matter of agency discretion. When

³³ The APA defines “adjudication” as “agency process for the formulation of an order.” 5 U.S.C. § 551(7). In turn, the term “order” is defined as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.” *Id.* § 551(6). Finally, “licensing” is defined as including “agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment,

it comes to formulating new policy or rules, it is well established that “the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”³⁴ A trilogy of Supreme Court decisions — *Chenery II*, *NLRB v. Wyman-Gordon Co.*,³⁵ and *NLRB v. Bell Aerospace Co.*³⁶ — squarely addresses this issue. *Chenery II* held that an agency is not required to “disclose the policy it intends to apply in the future through a general pronouncement,” whereas *Wyman-Gordon* and *Bell Aerospace* established that “an agency is not required to make rules through public rulemaking procedures.”³⁷ The NRC has in the past chosen site-specific adjudicatory proceedings to implement general and significant policy changes. *See, e.g., KGE*, CLI-99-19, 49 NRC at 467. Here, the Commission acted well within its discretion to decide the NEPA terrorism issue for the first time in the

modification, or conditioning of a license.” *Id.* § 551(9). These definitions collectively encompass NRC orders.

³⁴ *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (hereinafter “*Chenery II*”); *see also Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 467 (1999) (hereinafter “*KGE*”).

³⁵ 394 U.S. 759 (1969).

³⁶ 416 U.S. 267 (1974).

³⁷ 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 2.12 (2d ed. 1997).

PFS case (and in three other decisions issued the same day³⁸) in the context of an ongoing agency adjudication. The Commission then simply applied the newly-minted precedent to the instant proceeding.

Petitioners also argue that, in applying the precedent to their proposed contentions in CLI-03-1, the Commission violated the hearing requirement of AEA Section 189a (42 U.S.C. § 2239(a)) and its own “administrative regulations.” (Pet’r Br. at 33-35.) This argument is also without merit. In *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1451 (D.C. Cir. 1984), the court of appeals emphasized that the AEA requires only that there be an opportunity for hearing on issues that are material and relevant to the licensing action. The NRC nonetheless could properly “summarily dismiss any claim that did not raise genuine issues of material fact” *Id.* at 1448-49. The NRC’s regulations applicable at the time, 10 C.F.R. § 2.714(b)(2)(iii), establish that for a contention to be admissible — and to justify a hearing — it must have a basis sufficient “to show that a genuine dispute exists . . . on a material issue of law or fact.” The proposed contentions at issue here alleged, in one form or another, that the consequences of terrorist attacks

³⁸ See *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002).

on the ISFSI or storage casks must be addressed under NEPA. In CLI-03-1, relying on its *PFS* precedent, the Commission concluded that there was no basis for the issue in law — in effect, that the contention did not establish a genuine dispute on a material issue. The Commission thus properly applied its administrative criteria for determining admissible contentions.

Petitioners argue that, in making this determination, the Commission somehow “improperly judged the merits of Petitioners’ environmental contention.” (Pet’r Br. at 35-36.) This argument is also without merit. The Commission did not need to hold hearings “on the merits” of a legal question that was addressed in a decision only weeks earlier. The Commission did not err in CLI-03-1 in consistently applying its precedent to the DCCP proceeding. It is well established that, “[a]bsent constitutional constraints or extremely compelling circumstances” (neither of which are present here), ‘administrative agencies “should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”’” *Vt. Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 543 (1978) (citations omitted). *See also, e.g., Adkins v. Trans-Alaska Pipeline Liab. Fund*, 101 F.3d 86, 89 (9th Cir. 1996). Indeed, increased deference is due to the NRC with respect to the application of the agency’s procedural rules because of the “unique degree “to which broad responsibility is reposed in the [Commission],

free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.””” *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 54 (D.C. Cir. 1990) (quoting *BPI v. Atomic Energy Comm’n*, 502 F.2d 424, 428 n.3 (D.C. Cir. 1978) (quoting *Siegel v. Atomic Energy Comm’n*, 400 F.2d 778, 783 (D.C. Cir. 1968))).³⁹

D. THE COMMISSION PROPERLY REJECTED THE PETITIONERS’ EXTRAORDINARY PETITION TO EXPAND THE HEARING

Petitioners seek reversal of the Commission’s decision in CLI-02-23. In that decision, the Commission denied the extraordinary petition to suspend the NRC ISFSI licensing proceeding pending the Commission’s review of measures to protect against terrorist attack, or, in the alternative, to expand the scope of the ISFSI adjudicatory proceeding to consider additional security measures to be imposed at the ISFSI *and* the power plant. On review, Petitioners do not challenge the Commission’s decision not to suspend the proceeding. Rather, Petitioners contend that the Commission’s decision violated their statutory right to a hearing under AEA Section 189a. (Pet’r Br. at 55-56.) There is no question, however, that the Commission acted appropriately in dismissing this request.

³⁹ Petitioners’ terrorism contentions were inadmissible for other reasons. See note 5 above.

Petitioners' focus on appeal is on the second aspect of the petition to the Commission: the alternative request that the Commission expand the site-specific ISFSI adjudicatory proceeding to encompass the topic of additional security requirements to be imposed at DCPD (both at the power plant and the ISFSI). The Commission properly found that this request was beyond the scope of the proceeding. *Id.* at 236. (ER 30.) The Commission again was clearly correct. First, the issue of requirements related to the *power plant* (previously licensed under Part 50 of the NRC's regulations) was plainly beyond the scope of a proceeding related to a separately-licensed ISFSI (to be separately licensed under Part 72 of the NRC's regulations). Second, there was no dispute in the petition that the current NRC security requirements would be met at DCPD or the ISFSI. The extraordinary petition actually focused on the possibility of *new* requirements — an issue that the Commission chose to address by way of a generic review. Any additional requirements developed as a result of the generic review could be and would be applied, as appropriate, to either the Part 50 power plant or Part 72 ISFSI once those requirements were developed and adopted by the agency. Any public participation with respect to those initiatives would follow from the appropriate regulatory process. *See id.* (ER 30.)

Petitioners now argue that the Commission lacked the discretion to “completely deny” Petitioners any opportunity to be heard on their claims. (Pet'r

Br. at 55.) However, the Commission did no such thing. As argued by the Commission, site-specific security issues (related to the ISFSI, not the power plant) could have been raised for hearing, if the issues were not otherwise precluded by rule or regulation. (Resp't Br. at 31.) Petitioners did not identify any such issues. The Commission also correctly held in its decision below that the issue of possible new, generic security requirements was not appropriate for a specific adjudication on licensing of one proposed ISFSI, but was a "matter more appropriate for a generic rulemaking petition." *PG&E*, CLI-02-23, 56 NRC at 237. (ER 30.)

Petitioners themselves cite the decision in *Union of Concerned Scientists v. NRC*, 711 F.2d 370 (D.C. Cir. 1983), where the court of appeals recognized that the NRC has the discretion to offer a rulemaking on an issue instead of a hearing. *Id.* at 380, n.24. In the present case, consistent with that discretion, the petitioners had other opportunities to present their views to the Commission, and the petitioners chose not to pursue those opportunities. In their petition to the Commission, the petitioners specifically asserted that the petition *was not* any of the following: (1) a request for rulemaking pursuant to 10 C.F.R. § 2.802; (2) a request for enforcement action under 10 C.F.R. § 2.206; (3) a request for waiver pursuant to 10 C.F.R. § 2.758;⁴⁰ or (4) a request for exemption pursuant

⁴⁰ Section 2.758(b) provides that a party to an adjudicatory proceeding may petition that the application of a specific regulation be waived, or an

to 10 C.F.R. § 72.7. (ER 126, 128.) Petitioners therefore eschewed several specific procedures that were available to them, preferring instead to attempt to force the issues into the public hearing process where those issues did not belong.⁴¹ The Commission did not abuse its discretion in denying the extraordinary petition. Indeed, it acted correctly.

exception made for a particular proceeding. The sole ground for such a waiver is that “special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.” 10 C.F.R. § 2.758(b).

⁴¹ Petitioners complain that the Commission has not subsequently instituted a rulemaking “to establish changes in the design basis threat and other security-related measures for [DCPP] or the ISFSI.” (Pet’r Br. at 54.) To the extent Petitioners are arguing with the adequacy of the hearing offered on the NRC’s security program changes (the orders discussed above), that issue is not before this Court in the present context. Nonetheless, the Commission’s choice to implement changes via individual orders, rather than a rulemaking, is a choice well within the discretion of the agency. *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

VIII. CONCLUSION

The Commission correctly concluded that NEPA does not mandate reviews of terrorism threats. The Commission also acted within its discretion (1) in finding Petitioners' contentions on terrorism to be inadmissible as a matter of law; and (2) in declining to expand the scope of its site-specific adjudication to encompass a generic review of security matters.

Respectfully submitted,



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ATTORNEYS FOR
PACIFIC GAS AND ELECTRIC COMPANY

Dated in Washington, District of Columbia
This 26th day of May 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE,
SANTA LUCIA CHAPTER OF THE
SIERRA CLUB, AND PEG PINARD,
PETITIONERS,

v.

U.S. NUCLEAR REGULATORY COMMISSION
AND THE UNITED STATES OF AMERICA,
RESPONDENTS,

AND

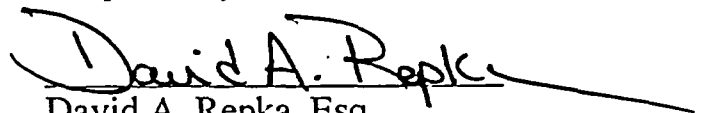
PACIFIC GAS AND ELECTRIC COMPANY,
RESPONDENT-INTERVENOR.

No. 03-74628

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the United States Court of Appeals for the Ninth Circuit, Respondent-Intervenor Pacific Gas and Electric Company hereby states that it is aware of no related cases within the meaning of Rule 28-2.6.

Respectfully submitted,


David A. Repka, Esq.
Counsel for Pacific Gas &
Electric Company

May 26, 2004

Form 8. Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 03-74628

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *and attached to the back of each copy of the brief*

I certify that: (check appropriate option(s))

X1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 13,785 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

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 2. The attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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4. *Amicus Briefs*

- ☐ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

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5/26/04

Date

David A. Repk

Signature of Attorney or
Unrepresented Litigant

ADDENDUM

**Safety Evaluation Report, Docket No. 72-26, Diablo Canyon Independent
Spent Fuel Storage Installation, Materials License No. SNM-2511,
March 2004**



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 22, 2004

Mr. Lawrence F. Womack
Vice President, Nuclear Services
Diablo Canyon Power Plant
P.O. Box 56
Avila Beach, CA 93424

SUBJECT: ISSUANCE OF MATERIALS LICENSE NO. SNM-2511 FOR THE
DIABLO CANYON INDEPENDENT SPENT FUEL STORAGE
INSTALLATION (TAC NO. L23399)

Dear Mr. Womack:

By letter dated December 21, 2001, as supplemented, the Pacific Gas and Electric Company (PG&E) submitted an application to the U.S. Nuclear Regulatory Commission (NRC) requesting a site specific license in accordance with 10 CFR Part 72 for an Independent Spent Fuel Storage Installation (ISFSI) at the Diablo Canyon Power Plant. Based on our review of your application, as revised and supplemented, the NRC staff has determined that there is reasonable assurance that: (i) the activities authorized by the license can be conducted without endangering the health and safety of the public and (ii) these activities will be conducted in compliance with the applicable regulations of 10 CFR Part 72. The staff has further determined that the issuance of the license will not be inimical to the common defense and security.

Materials License No. SNM-2511 is hereby issued to the Pacific Gas and Electric Company, pursuant to 10 CFR Part 72. A copy of the license is enclosed. Issuance of this license constitutes authorization for a 20-year term to receive, possess, store, and transfer spent fuel and associated radioactive materials resulting from the operation of the Diablo Canyon Power Plant in an independent spent fuel storage installation to be located on the plant site in San Luis Obispo County, California. All future communications regarding this license should refer to License No. SNM-2511, Docket No. 72-26.

The Diablo Canyon ISFSI license contains license conditions and Technical Specifications that shall be met in order to comply with NRC regulations. These items have been discussed and reviewed with Mr. Terry Grebel of your staff. License Condition 16 grants the requested exemption from the provisions of 10 CFR 72.72(d), with respect to maintaining a duplicate set of spent fuel storage records. PG&E may maintain a single set of ISFSI records in a records storage facility that satisfies the standards of ANSI N45.2.9-1974. All other requirements of 10 CFR 72.72(d) must be met. By letter dated January 16, 2004, PG&E submitted revisions to the proposed Diablo Canyon ISFSI Technical Specifications, in order to address the NRC staff position described in Interim Staff Guidance Document ISG-11, Revision 3, issued on November 17, 2003. The final Technical Specifications reflect these changes, which limit the storage of spent fuel in the Diablo Canyon ISFSI to low burnup assemblies, defined as fuel assemblies with a maximum average burnup of less than or equal to 45,000 megawatt days per metric ton of uranium.

On February 3, 2004, the NRC staff issued its approval of changes to the Diablo Canyon Physical Security Plan. These changes reflect the incorporation of appropriate features,

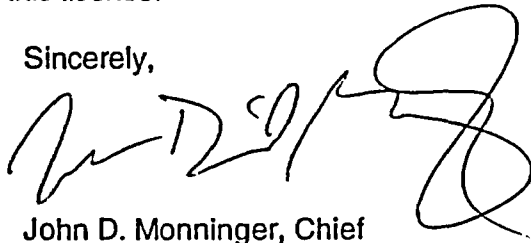
measures and procedures to address the ISFSI. The revised Plan and the staff's security evaluation contain Safeguards information and are therefore withheld from public disclosure.

In conjunction with the issuance of this license, the staff published a Notice of Issuance of Environmental Assessment and Finding of No Significant Impact for the Diablo Canyon Independent Spent Fuel Storage Installation in the Federal Register on October 30, 2003 (68 FR 61838). The staff's Environmental Assessment, which was sent to you on October 24, 2003, concluded that there are no significant radiological or non-radiological impacts associated with the proposed action, and that issuance of a license for the interim storage of spent nuclear fuel at the Diablo Canyon ISFSI will have no significant impact on the quality of the human environment.

On February 11, 2004, the NRC staff transmitted the preliminary license and Safety Evaluation Report for the Diablo Canyon ISFSI for your review. PG&E provided comments in a letter dated February 27, 2004. Your comments have been considered and incorporated, as appropriate, in the enclosed final Safety Evaluation Report for the Diablo Canyon ISFSI. Also enclosed is a copy of the Notice of Issuance which has been transmitted to the Office of the Federal Register for publication.

Please contact me at (301) 415-8540, or James R. Hall of my staff at (301) 415-1336, if you have any questions regarding issuance of this license.

Sincerely,

A handwritten signature in black ink, appearing to read 'John D. Monninger', is written over a large, stylized, handwritten 'Z' or 'S' shape.

John D. Monninger, Chief
Licensing Section
Spent Fuel Project Office
Office of Nuclear Material Safety
and Safeguards

Docket No. 72-26 (50-275, -323)
TAC No. L23399

Enclosures: 1. Materials License No. SNM-2511
2. Safety Evaluation Report
3. Federal Register Notice of Issuance

cc: Mailing List (w/enclosures)

SAFETY EVALUATION REPORT

DOCKET NO. 72-26

**DIABLO CANYON
INDEPENDENT SPENT FUEL STORAGE
INSTALLATION**

MATERIALS LICENSE NO. SNM-2511

MARCH 2004

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staff considers this classification to be appropriate for the types of accidents postulated for ISFSIs.

The revised DCPD Emergency Plan describes the equipment and methods to be used to evaluate releases of radioactive material. The plan describes the responsibility of plant personnel in the event of an accident. The plan also describes the type of information to be communicated to State and local agencies and to the NRC. The training required for plant personnel is described, as well as the accident scenarios and drills to be held to demonstrate readiness. DCPD has memoranda of understanding with off-site responders such as fire, police, hospitals and ambulance services. In addition, there are emergency plan implementing procedures for the plant staff to follow in the event of an emergency.

Based upon the staff's review of the revised DCPD Emergency Plan, information concerning the ISFSI has been adequately incorporated into the plan. The staff finds that the revised DCPD Emergency Plan provides reasonable assurance that facility personnel will be able to respond appropriately to any emergency conditions associated with the Diablo Canyon ISFSI, and that the requirements of 10 CFR §72.32(c) have been met.

10.1.6 Physical Security and Safeguards Contingency Plans

Section 9.6 of the SAR, "Physical Security Plan," provides an overview of the security program to be applied to the ISFSI to protect the stored spent nuclear fuel. The security program for the Diablo Canyon ISFSI will be incorporated into the DCPD Physical Security Plan, the Safeguards Contingency Plan, and the Guard Training and Qualification Plan. The applicant submitted proposed revisions to these plans in April 2002 and January 2003 (Pacific Gas and Electric Company, 2002b, 2003) to address ISFSI activities. These plans contain safeguards information and are therefore withheld from public disclosure.

- 10 CFR Part 73 prescribes requirements for the establishment and maintenance of a physical protection system which will have capabilities for the protection of special nuclear material at fixed sites and in transit and of plants in which special nuclear material is used. 10 CFR 73.55(a) describes the general performance objective and requirements for physical protection of licensed activities in nuclear reactors. This objective specifies that the licensee shall establish and maintain an onsite physical protection system and security organization which will have as its objective to provide high assurance that activities involving special nuclear material are not inimical to the common defense and security and do not constitute an unreasonable risk to the public health and safety.

The general features of the security program for the Diablo Canyon ISFSI are as follows:

The DCPD security force will control access to the Diablo Canyon ISFSI protected area. This access will be limited to those who must enter for work-related activities. There will be a list of approved individuals, and identification badges will be required. Persons, vehicles, and hand-held items will be appropriately screened prior to entry to the protected area.

An intrusion detection system will be provided for the Diablo Canyon ISFSI protected area. Manned stations will be provided on the DCPD site to monitor intrusion detector system alarms,

coordinate security communications, and perform closed-circuit television surveillance and alarm assessment.

The DCPD Safeguards Contingency Plan addresses responses to potential threats and contains a responsibility matrix as guidance for security force actions as required by 10 CFR §72.184. The contingency planning includes detailed response procedures and means for obtaining assistance from local law enforcement agencies.

The DCPD Guard Training and Qualification Plan defines training and qualification requirements for the security force as required by 10 CFR §73.55. The plan includes crucial security tasks and identifies the positions that must be trained in these tasks. The plan also provides requirements for initial and recurring training and a program for screening the background, physical condition, and mental qualifications of security force members.

The revised DCPD Physical Security Plan, Safeguards Contingency Plan, and Guard Training and Qualification Plan will be implemented using written procedures, as required by 10 CFR §73.55(b)(3)(i), and adherence to these plans will be incorporated as a condition of the 10 CFR Part 72 license for the Diablo Canyon ISFSI.

In its review of PG&E's proposed changes to the DCPD Physical Security Plan, the Safeguards Contingency Plan, and the Guard Training and Qualification Plan (U. S. Nuclear Regulatory Commission, 2004), the staff determined that the revisions to those plans to address the interim storage of spent fuel in the proposed ISFSI comply with the requirements of 10 CFR Part 73 and are acceptable. The staff has further concluded that, with respect to the proposed revisions, that: (1) there is reasonable assurance that the health and safety of the public will not be endangered by operation in the proposed manner; (2) such activities will be conducted in compliance with the Commission's regulations; and (3) the issuance of these physical security plan changes will not be inimical to the common defense and security or to the health and safety of the public. In addition, the staff has determined that the proposed changes do not decrease the safeguards effectiveness of the plans with respect to the operating reactor units. Therefore, the staff finds that the revised DCPD Physical Security and Safeguards Contingency Plans will provide reasonable assurance that spent nuclear fuel at the Diablo Canyon ISFSI will be protected in accordance with requirements of 10 CFR Part 73.

10.2 Evaluation Findings

The staff reviewed the ISFSI SAR and has determined that the applicant has established an acceptable plan to conduct operations for the Diablo Canyon ISFSI. The staff has determined that:

- The conduct of operations described for the Diablo Canyon ISFSI meets the requirements of 10 CFR §72.40(a)(4) in that PG&E will be qualified by training and experience to conduct the operations included in the license.
- The conduct of operations described for the Diablo Canyon ISFSI meets the requirements of 10 CFR §72.24(h), §72.24(i), §72.24(j), and §72.24(k); §72.28; §72.40(a)(9), §72.40(a)(13); §72.180; §72.184; and Part 72, Subparts H and I, in that PG&E has provided a description of the procedures and policies that assure that operation of equipment and controls that are important to safety is limited to

trained and certified personnel; has provided an adequate operator training and certification program; has operator qualifications that assure that the physical condition and general health of operators will not cause operational errors that could endanger other workers or the health and safety of the public; and has an adequate physical security plan.

- The staff is granting an exemption to the record keeping requirements of 10 CFR §72.72(d) because an equivalent record keeping system has already been established at the DCPD and granting the exemption would obviate the need for duplicate record keeping systems.

10.3 References

Pacific Gas and Electric Company. *Response to NRC Request for Additional Information for the Diablo Canyon Independent Spent Fuel Storage Installation Application (TAC No. L23399)*. Letter DIL-02-009, October 15, 2002. Avila Beach, CA: Pacific Gas and Electric Company. 2002a.

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U.S. Nuclear Regulatory Commission. *Information Relevant to Ensuring That Occupational Radiation Exposures at Nuclear Power Stations Will Be ALARA*. Regulatory Guide 8.8. Rev. 3. Washington, DC: U.S. Nuclear Regulatory Commission. 1978.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE,
SANTA LUCIA CHAPTER OF THE
SIERRA CLUB, AND PEG PINARD,
PETITIONERS,

v.

U.S. NUCLEAR REGULATORY COMMISSION
AND THE UNITED STATES OF AMERICA,
RESPONDENTS,

AND

PACIFIC GAS AND ELECTRIC COMPANY,
RESPONDENT-INTERVENOR.

No. 03-74628

CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWERING BRIEF OF RESPONDENT-INTERVENOR PACIFIC GAS AND ELECTRIC COMPANY" in the captioned proceeding have been served as shown below by United States mail, first class, or, as shown by an asterisk (*), by overnight delivery service, this 26th day of May 2004.

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